No. 82-2113

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. H. RICHARDSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

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Since the filing of the petition herein, we have discovered the case of *United States v. Sneed,* 705 F.2d 745 (1983), which substantially adds to the confusion in the circuits over the Question Presented.

Sneed's conviction was reversed because of errors in the jury selection at his trial and an insufficiency of the evidence claim was not addressed by the court of appeals. On remand to the district court, he urged that retrial was barred by double jeopardy considerations because the evidence at the first trial was insufficient to support his conviction.

He subsequently filed an interlocutory appeal from the denial of his motion which was entertained and reversed by the Fifth Circuit. The court noted that this was strictly

a double jeopardy appeal, totally isolated from Sneed's first appeal. "We could not, and do not, now reconsider our refusal to address the [insufficiency] issue." In finding appellate jurisdiction the court relied upon *Abney v. United States,* 431 U.S. 651 (1977), and felt unrestained by *United States v. Becton,* 632 F.2d 1294 (5th Cir. 1980) and *United States v. Rey,* 641 F.2d 222 (5th Cir. 1981). In sounding the death knell of those latter two cases, the court distinguished them on the theory that they were really cases seeking review of motions to acquit disguised as double jeopardy claims, while Sneed made a "straight forward double jeopardy claim." 705 F.2d at 747. A distinction, we submit, without a difference. *Sneed* and the instant case were in precisely the same posture at the time their double jeopardy claims were pressed on appeal, *i.e.,* a transcript existed of the completed trials and neither a conviction nor an acquittal obtained.

In apparently veering away from *Becton and Rey,*[1] the court observed in footnote 4: "The Third Circuit has criticized the reasoning of both cases: '[Rey and Becton] failed to recognize the defendants' double jeopardy rights by the simple expedient of recharacterizing the nature of their claims . . .' *United States v. McQuilkin,* 173 F.2d 686 n. 7 (3d Cir. 1982)"

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[1]A result foreshadowed by Judge Scalia dissenting herein, who believed that the jurisdictional holding was so flawed that it was "most unlikely that the obstacle to immediate appeal will long endure. . . ." (App. A, p. 31a.)

It seems clear that there presently exists a conflict in the Question Presented not only between the Circuits but also within the Fifth Circuit, requiring its resolution at this time.

Respectfully submitted

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